

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOE BOEHMS

PLAINTIFF

V.

NO. 1:94CV21-JAD

CRAVEN CROWELL, ET AL

DEFENDANTS

MEMORANDUM OPINION

Pursuant to the court's Memorandum Opinion dated May 15, 1996, finding that the plaintiff was the victim of age discrimination when he was not selected to be manager of the Tennessee Valley Authority's Customer Service Center in Tupelo, Mississippi, the parties have submitted further briefs on the issue of plaintiff's damages. The court is now prepared to rule on the issue of plaintiff's damages.

The law is well-settled in the Fifth Circuit that an employee must show that he was constructively discharged in order to recover back pay for lost wages beyond the date of his retirement or resignation. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65-66 & n.8 (5th Cir. 1980); Jurgens v. E.E.O.C., 903 F.2d 386, 389 (5th Cir. 1990). A constructive discharge occurs when "the working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to [retire]." Bourque, 617 F.2d at 65 (quoting Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977)). While the court is sympathetic to plaintiff's claim, the proof fails to show the "aggravating factors" necessary for a constructive discharge. McCann v. Litton Systems, Inc., 986 F.2d 946 (5th Cir. 1993); Stephens v. C.I.T. Group/Equipment Financing, Inc., 955 F.2d 1023 (5th Cir. 1992). As

noted in the prior opinion of this court, the operations manager position offered to plaintiff, while equal in pay, was not equal in status and was viewed as inferior to the customer service center manager position. However, the evidence is clear in this case that plaintiff could not reasonably believe his demotion was a "harbinger of dismissal." Stephens, 955 F.2d at 1028. Plaintiff was offered another job, even though viewed as inferior, and several other former district managers accepted positions as operations managers in the new reorganization. There is simply no proof that plaintiff's situation is materially distinguishable from the former district managers who remained, other than personal preference. Moreover, there is no proof in the record that plaintiff's "working conditions [were] so intolerable that [he was] forced into an involuntary resignation." Young v. Southwestern Savings & Loan Association, 509 F.2d 140, 144 (5th Cir. 1975).

Clearly, plaintiff was distressed that he was placed in a position that lowered his status in the eyes of his fellow employees and himself, especially after the long years of employment with TVA. This distress alone is simply not enough to show constructive discharge under the law of this circuit. While it seems inadequate to correct a finding of age discrimination, the court finds that plaintiff is entitled to recover the sum of \$4,688.24 which reflects the back pay for the period between his nonselection on January 15, 1992, and his retirement on November 13, 1992 ($\$67,547.57 - \$62,859.33 = \$4,688.24$).

While the court is aware that some circuits have refused to order the recovery of attorney's fees against federal defendants in ADEA cases, see, e.g., Lewis v. Federal Prison Industries, Inc., 953 F.2d 1277, 1281-82 (11th Cir. 1992); Palmer v. GSA, 787 F.2d 300, 302 (8th Cir. 1982), the Fifth Circuit has allowed such awards to stand. Smith v. Office of Personnel Management, 778 F.2d 258, 264 (5th Cir. 1985), cert. denied 476 U.S. 1105 (1986). An award of reasonable attorney's fees in this case clearly effectuates the purposes of the ADEA, particularly in light of the limited damages available to plaintiff. Accordingly, the court finds that plaintiff is entitled to a reasonable attorney's fee to be determined in accordance with the court's local rules.

A separate judgment will be entered.

This 1st day of October, 1996.

UNITED STATES MAGISTRATE JUDGE